THE

Madras Weekly Notes.

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'INDIAN LAW AND ENGLISH LEGISLATION.'

The article in the August number of the Contemporary Review on the above subject by the Hon'ble Justice Sankaran Nair is a valuable contribution to the literature of the principles of Social legislation and deserves very careful attention. In it the learned writer discusses the situation in India caused by the conflict between the eastern and western civilisations. He contrasts, in graphic language, the salient features of the two civilisations as represented by their legal systems. The Hindu Law, he says in effect, mixed up legal rules with moral and religious injunctions. The English Law had no concern with the latter. The Hindu Law, based on the caste system perpetuated class distinctions, and treated the classes unequally. The English law recognised the equality of all. In other respects also as in their treatment of women, the preservation of freedom of contract, etc., the English law was superior to the Hindu, for "the English law is one under which a race has made astonishing progress, and is suited therefore to the needs of a progressive Community. The Hindu law and usage, on the other hand, were the product of a society either already enslaved or on the road to slavery, and were suited to a stagnant society." In consequence of this manifold inadequacy of the Hindu Law to meet the exigencies of modern times, the British rulers, says the learned writer, began to interfere ; *Satee* was put down; slavery was abolished ; the age of consent was defined; widow re-marriage was legalised;caste disabilities were removed; rights of person and property were secured; and India's intellect and moral consciousness were awakened to the inhumanity of the system under which such evils had been permitted. The argument in the article proceeds to set out that the conception of British Jurisprudence as emanating from the sovereign is radically at variance with that of Hindu Law where the sovereign, at best, administered it, but usually through the local assemblies where the Brahman's was the prevailing influence. The practical conclusion of the article is that the orthodox Hindu is always an intolerant obstructionist of all social reform, and no legislation in the matter is possible which does not ignore his opposition. The article, we need hardly add, is the outcome of the author's ardent desire to support the new Civil Marriage Bill of the Hon'ble Mr. Basu, which is really the first piece of thorough-going social legislation that the British Indian legislature is invited to undertake.

We propose to consider first whether the learned writer's eloquent impeachment of Hindu Law at the bar of the twentieth century civilisation, as summarised above, is based on facts and sound logic, or whether it is merely a rhetorical grouping

of a situation for which the Hindu Law of the sages is in no wise responsible. The first point to emphasise in connection with the law of the Smritis is that it was primarily intended for the twice-born classes chiefly and that it was its intrinsic merit and fitness that led to its adoption, so far as it took place, by the Sudras and mixed classes. Says *Yagnavalkya* (I, 10): the ceremonies from *Nishaka* to *Smasana* are to be performed with mantras, only in the case of the twice-born. So *Vasishtha* : 'No Vedic Metre is prescribed for the Sudra ; for he is to have no (Vedic) Samskara (*Asamskarya*).' The widest license was given to Sudras in matters of daily life, diet, marriage, etc., and restrictions in these matters were heaped on the head of the Brahman chiefly, and the other twice-born classes limitedly. But to *all* classes were prescribed as essential duties, truth, patience, generosity and kindness to all (Vasihtha, V. 4); where a Brahman fell from his duties, he was condemned in strong language : 'The Atheist, the reviler, the ungrateful man, and the Brahman nourishing perpetual hatred, these are *chandalas* by their acts.' A wide range of arts and professions has been recognised for the Sudra from the earliest times. Thus Devala says : 'Service of the higher classes, avoidance of sinful acts, supporting one's family, agriculture, cattle raising, trade, painting, dancing, singing, etc., are the *dharma* of the Sudra.' And Yagnavalkya explains (I, 120) that where service under a twice-born is not taken, trade or the various crafts, are the legitimate duty of the Sudra, and that his attitude should be one of help to and co-operation with the other classes. No doubt the study of the Vedas was prohibited to them, but it is a mistake to say that all literature was forbidden. Even as class legislation, the rule that Vedic study should not be taken up by a Sudra, *i. e.*, the class which for generations before must have been unaccustomed to mental work is not blameworthy, from a utilitarian point of view. The dropping of classic study in modern educational institutions, the recognition that certain departments of service [are specially suited for certain classes as the East Indian, are parallel instances. And if the Vedas were prohibited ground, it did not follow that all literature was prohibited, for the study of the Kavyas, the Puranas, the sciences of the various arts, and all similar literature was at the disposal of the aspiring Sudra. And that he did avail himself of such study is borne out by the examples of the *Dharma Vyadha*, *Vidura*, and others in the puranas. Again the Buddhists and the Jains, excluded as they were from the study of the Vedas, still attained great eminence as Sanskritists, and their work on Sanskrit grammar, language, logic, and general literature, are extant to this day, to show what wide field was practically open to the non-brahmin, in spite of the prohibitions, in matters of Vedic study. Again, it is said that the ancient law-givers regarded the things of this world as transient, and thought of existence in a future invisible world as their ideal. As to this, it has to be pointed out that material welfare as the most likely aim of the majority of men was never forgotten by the sages of India. They were too shrewd readers of the human heart to suppose that all will turn saints. Counting on the natural operation of causes like love of luxury, covetousness, passion, etc., they interposed a check on their operation by elevating on a high pedestal the performance of duty without regard for

fruits, and taught men that the happiness of the soul was immeasurably preferable to the pleasures of the body. But the duties of the King, the details of the administrative art, the development of the arts of peace and war, the principles of sanitation, and many other matters that conduce to worldly prosperity engaged their serious attention as well, as is evident from the pages of the smrities and the puranas. 'A flourishing country,' 'a happy and contented people,' 'a land free of robbers,' 'absence of famines and floods,' 'moderate taxation,' and similar phrases are frequently used in our books to denote a country particularly well-governed. The very name of king, *rajan*, is derived from a root which means 'to please the people.' It is therefore wrong to say that the religious proclivities of our ancient law-givers seriously interfered with their grasping the truth that worldly welfare as such was an end aimed at by the majority of men and that rules of law must have regard to this view-point as well. Judging from reliable descriptions of the enormous wealth and trade-activity of the Hindus in comparatively recent times as for instance, the Vijianagar period, we have every reason to suppose that the Hindu legal system or its philosophical tenets never stood in the way of the majority of the people developing materially in various directions. It is certainly unjust to complain of their wider outlook with regard to a future world, as this belief had a steadying effect on their rapacious activities, a factor sadly wanting in the conditions of western countries, proud of their material achievements. Then again it is said that the English Law regards all human beings alike ; and that it was under English Rule that the immunity of the Brahman from legal punishment was no longer recognised. As to this, we have to remember that it is hardly just to compare the English Law of to-day with the law that we read in the smrities composed centuries back. The learned critic should not conveniently forget the crude state of the English Criminal Law even a century back, and suppose that the enlightened principles which govern criminal administration now, guided that administration always. Nor did the Brahmin escape legal punishment at all, as it is stated. It is a well known maxim in Hindu Law as in modern English practice that an offender who, from education or other causes ought to know better, deserves more severe punishment than one of little education. *Vidushah atikrame danda bhuyastwam* is a Sanskrit maxim which means 'when the learned man transgresses, the law, punishment must be more severe. So Manu says (VIII, 337-8). 'In the case of theft the guilt of a Sudra shall be eight-fold, that of a Vysya sixteen-fold, that of a Kshatriya thirty-two-fold, and that of a Brahman, sixty-four-fold, or quite a hundred-fold or even twice four-and sixty-fold.' Again (VIII, 350) one may slay without hesitation an assassin who approaches with murderous intent, whether he be one's teacher or a Brahman deeply versed in the Vedas.' No doubt in the case of the Brahman, capital punishment is prohibited and it is replaced by exile (VIII, 380). But whether this was out of a blind partiality for his caste or because such offences being rare, it was felt that exile would be a sufficient punishment, is a matter that has to be considered. Even modern Criminal Law obtaining in India fixes only the maximum punishment and leaves it to the discretion of the Magis-

trate to determine the exact punishment to be meted out. And so the sages have prescribed a lighter punishment on the Brahmin, except for the most heinous offence referred to above in VIII, 350 of Manu's Code. This certainly does not justify the statement that he shall escape scotfree from all legal punishment. It should also be remembered that the expiations prescribed for offences were some of them of a very severe type, (See Manu XI, 212-217,) and applied to the twice-born only. These rules were as binding as the rules prescribing fines and other punishments at the hands of the king. Even granting that there were some inequalities in the administration of criminal law to Brahmans, it is a principle not unknown to modern law, for we may instance the preferential treatment of Europeans and Americans in criminal trials under our present Code as an illustration of the same. That the inequality in treatment, which sometimes does exist in Hindu Law is not the result of mere partiality is also clear from the fact that in the field of Civil law, there is no such difference made ; on the other hand, the rules and restrictions in the life of the Brahman are numerous and exacting and are incompatible with any desire to specially favour him or secure him material prosperity.

Further this distinction, to our mind, must exist in any system of Criminal Law, however advanced though it may be. The object of punishment is the prevention of crime and as Bentham has pointed out the prevention would be 'particular prevention' where it prevents the person who has committed a crime from repeating the act or omission and 'general prevention' where it would prevent other members of the community from committing similar crimes. He further adds that "General prevention ought to be the chief end of punishment as it is its real justification, and where an offence is committed which is an isolated fact the like of which would never occur punishment may be useless." Punishment is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations but as an indispensable sacrifice to the common safety. Punishment of an individual must then have to effect of making the individual afraid of repeating the crime and must be such as to strike terror into other members of the community who are disposed to commit similar offences.

Bearing these basic principles of criminal law and the deterrent effect it is intended to produce, every lawyer will grant that in awarding the punishment such a law is pre-eminently a law of status. It is nothing else but the antecedents and character of a prisoner, that modern Criminal law takes note of, which is sought to be introduced into the ancient Hindu Criminal law by means of castes. It is also this very same principle that has led every enlightened Legislature to fix only the maximum punishment for all crimes leaving a large discretion to the Magistrates.

We shall next consider the so-called stagnancy of Hindu Law and the alleged impossibility of its being reformed from within.

THE VACATION COURT.

We publish elsewhere a communication over the initials C. S. S. questioning the correctness of the view expressed by us in our article headed '*Madras Times and the Vacation Court*' which appeared in the issue of the 30th of July of this journal. After carefully considering the argu-

ments put forward by our correspondent, we have no hesitation in maintaining that our view is the sounder one, and that the conduct of the Vacation Court was quite legal. The legality of a Judge transacting urgent business outside the Court-house in Chambers or elsewhere, has been well recognised both in England and in the United States of America. See the article on 'Judges Chambers' in Encyclopædia of the Laws of England with Forms and the Precedents Vol. II, page 643 and the article on the 'judges' in the American Cyclopædia of Law and Procedure Vol. XXIII, page 543). This Jurisdiction of the Court is not based on statute but grew up in proportion as necessity arose. As pointed out by us in our former article, a similar practice has prevailed in our High Court and it is too late in the day to question its legality.

No doubt necessity has been felt in England for restricting the scope of the business that may be transacted by a judge in Chambers and the legislature there had provided checks and limitations upon the exercise of such jurisdiction. But no such limitation is to be found in the Letters Patent erecting and establishing a High Court at Madras.

We are credibly informed that the sittings of the last Vacation Court outside Madras to dispose of urgent applications had in no way caused inconvenience to or affected prejudicially either litigants or the counsel concerned. But all the same we would respectfully suggest to the High Court the desirability of framing rules on the point so that there may not be room for such technical objections in future.

We may then point out that the argument founded by our correspondent on the terms of section 335 of the Code of Criminal Procedure has obviously no bearing on the present question; that section applies to the High Court when exercising its ordinary original criminal Jurisdiction. The second point raised by our correspondent as to the legality of the learned Vacation Judge holding his Court in Bangalore is we must say a difficult one and not altogether free from doubt. No doubt, as held (*In re Hayes*, I. L. R. 12 Mad. 39.) the Civil and Military station of Bangalore is foreign territory. But as pointed out by the learned Judges in that case, the Maharaja of Mysore who assigned the Civil and Military station of Bangalore to the British Government renounced the exercise of all jurisdiction within the said station in favor of the British Government. That being so, the High Court of Madras can undoubtedly exercise its jurisdiction in such territory. This view has been recently affirmed in the Full Bench Case of *In re. W. B. Lawrence, Public Prosecutor, Bangalore.*

Lastly our correspondent questions the power of the Vacation Judge to vary the place of sitting for the Vacation Court as notified by the learned Chief Justice. During vacation time, the vacation Judge is the High Court and in the absence of the Chief Justice has full power to arrange his sittings. See Clause 36 of the Letters Patent of 1865.

A vakil writes to a paper as follows:—"As I hear that the accused in the above case, find difficulty, owing to the peculiar nature of the case, in getting counsel for them for a reasonable fee may I request you, dear Editor, to allow me to say that on principle and in public interests, I am prepared to defend them, in the High Court for a moderate fee." Is this professional?

THE SPECIAL MARRIAGE AMENDMENT BILL.

Opinion of a prominent member of the Hindu Community.

At the outset I may state that there is nothing very formidable as feared by the opponents of the measure, nor, to my mind, will appreciable benefits flow from the proposed measure as its supporters believe and expect. Both sides are swayed by strong sentiments and find imaginary arguments each in support of its own views. Under the Act—both as it is and as now proposed to be amended—there is nothing to prevent a husband and wife who made the declaration under section 10 that they did not profess any of the religions mentioned in the preamble from subsequently embracing any one of those religions and if they did I don't think that anybody could contend the marriage validly performed under the Act became thereby a nullity, for the simplest of reasons that the Act does nowhere lay down that the parties to a marriage under its provisions shall always continue not to profess any of the religions mentioned in the preamble. If this view is correct there seems to be no necessity for the proposed amendment at all. One may broadly state as a proposition by no means unreasonable that an individual who wants to break through the rules—considered by his community to be essential and important—has no business to insist on being called a member of that community in spite of his having seceded of his own free will by not observing the rules which the community as a whole thinks were binding upon its members. There can be no one community some of whose members can say that they shall belong to the community for certain purposes only or that they choose to be bound only by some of the rules but not by others. I concede it will be very difficult--nay almost impossible--to enumerate all the rules which a member of any particular community has to observe in order to be recognised as a member of that community. While each community does—and in the nature of it must allow a very great latitude to its members in so many matters which are not thought of as essential and almost all communities wink at breaches of even some of the essential rules when committed not openly and defiantly, still it will not be impossible to think of a few rules which every community believes to be essential for its preservation as a community and among such rules one may safely say the restrictive rules relating to marriage can be mentioned. If the object is to promote or legalise marriages between members of the various subjects of the same caste why not introduce a simple bill to that effect. The word community is much more vague than the word caste. When we talk of the Indian community we include under it Hindus, Mahomedans, Parsees, &c. Hindu community will include the four castes Brahmins, Kshatriyas, Vysias, and Sudras and according to some the socalled depressed classes also. The Brahmin community includes Smarthas, Madhvas, and Vyshnavas and the various and numerous sub-divisions of each of them form a separate community. So also among Sudras there are the Mudeliars, Pillais, Chetties, Naidus, Koundens, Padayachis, Kallans and Maravars and others each being a community and again several of these are sub-divided into various smaller communities. If there be some means of doing away with all these distinctions and differences it may be a consummation devoutly to be wished and time and circumstances alone can

achieve, working gradually and imperceptibly removing the distinctions and differences one by one ; the wise and the real reformer should from behind facilitate the transformation by quietly yet cleverly helping, without openly and defiantly opposing the existing differences. If the community has no right to tyrannise over the individual much less has the individual any right to tyrannise over the community and a wise and sympathetic Government ought to protect both *i., e.*, each from the other. If the Hindu community wished the legislature to prevent by its laws any member of its community from leaving its fold certainly it would be a case of a community tyrannising over an individual and no sane Government would help the community in such a case. But is it so unreasonable for a community to seek the help of the standing legislature to protect the community from individuals who openly and defiantly snap their fingers in the face of the community by breaking rules which the community considers essential and who nevertheless wish to sail under false colors and pretend to belong to the community calling themselves members of the community. This is what was done when the Special Marriage Act was passed in 1872. It simply told individuals who thought they could not get satisfactory or desirable husbands or wives in their own communities that they were at liberty to seek husbands or wives from other communities, but that they must not pretend to belong to the communities to which they originally belonged. The intolerent reformer trying to enforce his views and opinions upon the community is something like a minority complaining that the majority must be bound by the opinion of the minority. To a philosopher a Hindu marrying a Mahomedan may appear to be not only innocent and unobjectionable but also quite natural provided both the parties are willing to marry each the other. But it is no exaggeration to say that quite 98 per cent of the Hindus and perhaps 99 per cent of the Mahomedans would look upon such marriages as not only ridiculous in the extreme but altogether outrageous. The Hon'ble member in charge of the Bill speaks in the 1st para. of the statement of objects and reasons of a community which feels the present declaration as an unnecessary condition. I don't know which community he is referring to. Is it the community who have already made the declaration or the community waiting to go through such marriages but have not done so shying at the form of the declaration ? The Hon'ble member in charge of the Bill, I gather from his speech, is willing to let alone all the other religionists and confine his amendment to Hindus alone. Probably this is due to the fact that the volume of opposition would be quite so large--almost overwhelming—from Mahomedans, Parsees and perhaps Christians also. As far as I can gather the main object seems to be to benefit the community by enabling it to retain within its fold men of education and wealth who would rather leave the community if necessary and marry outside the community into other communities. I humbly ask what if they do ? They don't cease to be Indians. In these days when we are trying to unify all classes and castes the fact whether a man calls himself a Hindu, a Mahomedan, Sikh, Jain or Parsee ought to matter very little to the educated among us and nobody should feel particularly anxious to call himself Hindu or Mahomedan. But on the other hand if the newly sprung or

springing community whose members can boldly declare that they are neither Hindu, Mahomedan, Christian nor in fact any of the 8 religionists mentioned in the Act gradually increases and spreads over the country slowly gathering strength our ideal of one nation would be realised. Thus we ought to welcome the declaration which has and will have the effect of creating a new enlightened community whose members are drawn from the 8 communities mentioned in the preamble. But if the fear is they will but form a ninth community and in spite of their existence the 8 communities would continue to exist even then there need be no anxiety, for, these enlightened persons though they have declared that they do not belong to any of the 8 religionists will, still, I hope, continue to be Indians and love those belonging to the 8 existing religions as their brother-Indians. It is idle to dispute that there is a large volume—a very large volume—of orthodox opinion which does not favour what are loosely styled mixed marriages. No doubt the more moderate among us will be satisfied if intermarriages among members of different sub-sections of the same caste take place freely. There are others who would like to see all Hindus at least—the four main castes—being allowed to intermarry. Then there are our ardent and go-ahead reformers who think no restrictions should exist in marriage. It seems to me that the existing law can satisfy everybody who wants to reform himself or herself. The Special Marriage Act 1872 and the Outcaste Relief Act both being liberal pieces of legislation protecting amply the rights of individuals against the tyranny of the religions and of the communities ought to be considered enough. The growing needs of the times have already simplified the cermonies required for a marriage the only essential element retained being some kind of publicity which will shut the mouths of everybody from questioning the *factum* of the marriage. No court has yet decided and nobody has ever contended that to validate a marriage it should be proved that every ceremony prescribed was gone through. Among Hindus tying of the Tali is the only essential insisted on, corresponding to the signi g of the register among Christians. The Bill is really a request proceeding from certain individuals—for none of the 8 existing communities wants it—who on account of a sense of delicacy are averse to making the declaration under section 10 and who against the wish of the community (whose rules about marriage they are unwilling to obey and would gladly break) like to cling to the community and style themselves members of the community. When the breaking away from Hindusim becomes necessary for the sake of personal gratification neither party need be sorry. The person breaking away being primarily responsible he has no right to complain and if the community really feels sorry there is nothing to prevent it from taking into its fold the seceder together with the husband or wife as the case may be. While I am in favour of a simple Bill which would pronounce intermarriage between persons belonging to the numerous sub-sections of the same caste valid, I am of opinion that the proposed amendment is quite unnecessary and also undesirable as I know there is a large volume of opinion of men of light and leading against it.

THE VACATION COURT.

To

The Editor

Madras Weekly Notes.

SIR,

Will you, of your courtesy, permit me to join issue with you on the subject of the Vacation Court for it seems to me you are in error in the conclusion at which you arrive, namely that the conduct of the Vacation Court was perfectly legal.

Any discussion of the animadversions of The Madras Times on that conduct is, I think, much to be deprecated, if not absolutely precluded. For a discussion imports the right to express contrary views and it scarcely needs argument to show that any attempt to controvert the views you have taken must lead to the reopening of proceedings which must have been intended to close the question.

The purely academical discussion of the jurisdiction of the High Court stands on a different footing, and it is on this question of jurisdiction alone that I now enter the field.

Your "lay contemporary" has been charged with a complete ignorance of the practice both here and in England, and you have referred to the Judicature Act and cited certain authorities to support the conclusion at which you have arrived. Your attention appears, if I may say so, to have been rivetted on the question of the practice of the judge sitting at chambers and you seem to have lost sight of, if indeed you ever intended to deal with, the more important question of the Judge's, that is of the Court's sitting outside Madras. The jurisdiction of the High Court at Madras is determined by the Indian High Courts Act, the Letters Patent and Statutes of the Indian Legislature. A reference to these statutes will, I think, make it clear that the High Court at Madras cannot, without the sanction of the Governor in Council, sit elsewhere than at Madras. I am inclined to go further and say that the Court cannot sit elsewhere than in the High Court Buildings though it is with considerable hesitation that I go as far as this. By the High Courts Act Her Majesty was empowered to erect and establish a High Court of Judicature at Madras for the Presidency of Madras. (Sec. 1). The jurisdiction of the High Court was to be determined by the Letters Patent and the Indian Legislature. (Sec. 9). The exercise of jurisdiction by one or more Judges was to be regulated by the rules of the High Court, subject to the Indian Legislature (Sec. 13). The point I would emphasise here is that the High Court was to be established "*at Madras for the Presidency of Madras.*"

Sec. 31 of the Letters Patent deals with the question of the exercise of jurisdiction elsewhere than at the ordinary place of sitting of the High Court. It may be urged that this section deals particularly with the law to be applied by the High Court in the exercise of jurisdiction at any place other than the usual place of sitting, but as this is the only section which deals with the question of the exercise of jurisdiction at a place other than the usual place of sitting, the use of the words "whenever it shall appear to the Governor in Council convenient...that the jurisdiction vested in the High Court should be exercised &c." leads to the clear inference that it is only with the sanction of the Governor in Council that any jurisdiction can be exercised outside the usual place of sitting, and the direction of the law to be applied

does not disturb this inference. The Despatch of the Secretary of State, para 29, makes it quite clear that it was never intended that the High Court should exercise jurisdiction elsewhere than at its ordinary place of sitting. The Criminal Procedure Code is explicit on this point. The High Court shall hold its sittings at the place at which it now holds them or at such other place ...as the Local Government may direct.

(2) But it may, from time to time,...with the consent of the Local Government hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints (C.P.C.,S. 335). If anything further is necessary to show the intention of the legislature with regard to the sittings of the High Court, I would invite a comparison of the statutes I have referred to with Sec. 26 of the Judicature Act which empowers the English Judges, subject to rules, to sit and act at any time, and at any place, for the transaction of any part of the business of the Court, during or after term. Subsequently by an order in Council made under the Courts of Justice Building Act, London causes at *nisi prius* were to be tried at the Royal Courts.

It is this order which has suggested to me the narrower meaning of the words "usual place of sitting" in the statutes referring to our High Court.

I do not think any one would for a moment seriously contend that the High Court of Madras can sit and exercise its jurisdiction in foreign territory. The High Court of Madras cannot, I think, sit at Bangalore. Bangalore is foreign territory. It has been held that even the Civil and Military Station of Bangalore is foreign territory (*In re Hayes*, I. L. R. 12 Madras 39.)

If my interpretation of the statutes is correct the exercise of any jurisdiction by the High Court outside Madras, or, to use the words of the Charter, elsewhere than at the usual place of sitting, without the sanction of Government is illegal, an order for bail, for example, passed outside Madras in the face of Sec. 335 Criminal Procedure Code; and the argument is not affected by showing that Judges of the High Court have often exercised Jurisdiction outside Madras without the sanction of Government; it might as well be argued the other way from the fact that a Vacation Judge refused to hear applications except in the High Court Buildings.

In dealing with any question of practice it must always be remembered that a mere rule of practice cannot restrain the operation of the substantive provisions of an Act of Parliament or a statutory rule (*Harbottle* v. *Roberts*, (1905) 1 K. B. 572). In the case of *The Raja of Ramnad* v. *Seetharam Chetty* (26 Mad. 120) the practice of the Original Side appears to have been urged in support of the order. The Court (Sir Arnold White, C. J. and Davies, J.) said, "We are told that the order is in accordance with a practice that obtains on the original side of the High Court. The question is—is the order in accordance with law?"

This must be clearly before us in considering the question of the jurisdiction and practice of the judge sitting at chambers. As I read your article I understand you to contend that the jurisdiction of the court is not limited, and that there is a general authority to exercise jurisdiction at chambers, which would include the judge's houses.

I dispute this and contend that the authority to exercise jurisdiction at chambers is distinctly limited by law and prac-

tice, both in England and here. It is more limited here than in England.

In England the legality of specific orders made by a judge at chambers has been more than once questioned on the ground that they were made at chambers. The cases you have cited are instructive on the point, omitting the case in 6 Q. B. D. 674 which is not relevant.

The earliest case is that of *The King* v. *Almon*, 97 Eng. Rep. 94. This was a case of 1765. No judgment was delivered in the case, but the opinion of the Judge was reported. The learned judge says (p. 103) "a doubt has been rather hinted at than made as to the legality of orders made by Judges at their houses or Chambers." And he says, with regard to the custom of making orders at chambers, "but whenever it began it stands on too firm a basis to be now shaken." There have been a great many changes in law and practice during the century and half that has elapsed since that case, and practices are now overruled which would not have been disturbed in those days. The Court of Appeal in *Moore* v. *Ullcoats Mining Co.* overruled a practice stated to have been followed in the C. D. for 30 years. (Annual Practice 1911. Vol. II, p. 490).

The next case is that of *Smeeton* v. *Collier*, 1 Ex. Rep. 457. This case was decided in 1847. The question was whether a Judge at chambers had power to make a certain order. As regards the particular order in question it was held that he had the power. This case decides that where a statute gives powers to a Superior Court in general terms, it might be exercised in Chambers, unless there is something in the context of the Act which leads to a different conclusion. Parke, B. refers (at p. 463) to certain statutes in which the distinction between court and chambers is made.

Baker v. *Oakes*, 2 Q. B. D. 171, which you cite is against you. In this case it was held that the order made by the judge at chambers was made without jurisdiction. Cockburn, C. J. (at p. 174) says, "Had the learned Baron jurisdiction as a judge representing the court? It may be taken that he was acting as a judge at chambers, but I am clearly of opinion that, as such, he had no such power (*i. e.*, power to make the order for costs); for Order L. V. only gives the power to the Judge at the trial or the court."

Jurisdiction to sit at chambers is conferred by Sec. 39 of the Judicature Act. It is a limited jurisdiction. Some orders can be made at chambers while others cannot. The authorities on the point are all collected in the Annual Practice and I will content myself with referring to it. They are dealt with under Sec. 39 of the Judicature Act and will be found in Vol. II, p. 674. I would also refer you to p. 490 (Practice in Chambers) and p. 492 (The Court or a Judge).

I am not aware of any reported Indian case in which the legality of an order has been questioned on the ground that it was made at chambers.

On the Original Side of the High Court at Madras the matter is governed by Rules154, 177 and 180. These rules regulate the ordinary practice of the Court and the proviso to Rule 180 empowers the Judge to direct any matter to be heard at chambers. An order directing a matter that is ordinarily heard in Court to be heard in Chambers is a discretionary order and ought to be specifically recorded.

On the Appellate Side the Court is governed by the Civil and Criminal Procedure Codes. There is nothing

corresponding with Section 39 of the Judicature Act. The only guide seems to be that afforded by the English authorities, namely that when an act is directed by the statute to be done in Court it is to be done by the Court in banco; when it is permitted to be done by the Court or a Judge, it may be done by the Court in banco or by a Judge at Chambers. The Court possibly has power to make rules for the exercise of certain jurisdiction in chambers, but until the rules are made all, or practically all, the jurisdiction exercised under the Civil and Criminal Procedure Codes appears to be exerciseable only by the Court in banco.

With regard to the Vacation, no difficulty would be likely to arise if the rules of the Vacation notice were strictly adhered to. There is a difference between the Vacation notice of the High Court in England and that of the High Court at Madras. In England the Vacation Judge sits in Court in the Chancery Division on certain days to dispose of such matters as are usually heard in Court; on other days he sits in chambers. In the King's Bench Division he sits in chambers. Urgent applications on the days when the Judge is not sitting in Court or chambers are forwarded to the Judge by post with a certificate of urgency from counsel and are returned by the Judge to the Registrar.

In Madras certain days are appointed for the sitting of the Judge in Court. Urgent applications to be heard on the days when the Judge is not sitting are presented to the Registrar. If he considers them sufficiently urgent he will transmit them to the Judge. The Notice goes on to say they will be "heard on 24 hours notice." It does not say where they will be heard, whether on the steps of the Judge's Club or in Court. It would, I take it, depend on the nature of the application whether it should be dealt with in chambers or in Court.

But a matter that raises more interest is the right of the Vacation Judge to vary the notice. Under Sec. 14 of the High Courts Act, the Chief Justice determines the sittings of the Judges. The Vacation Judge is in no sense an officiating Chief Justice. The question would then turn on the power of the Chief Justice to delegate his authority. Without going into the niceties of this question I would maintain that the Notice should not be lightly varied and that rule as to urgent application when the Judge is not sitting is a strict rule.

One other matter in your article calls for attention. You have charged your lay contemporary with "gross misrepresentation" of certain mattters. That charge can be answered by a re-reading of the original article.

C. S. S.